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IN THE

Supreme Court of the United States

October Term, 1982

BIAGIO PINTO a/k/a BOB PINTO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CARMEN C. NASUTI
NASUTI & MILLER
1325 Spruce Street
Philadelphia, PA 19107
(215) 545-8488
Counsel for Petitioner

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTION PRESENTED

Whether a prosecution for the offense of federal mail fraud is justified on the basis of violation of a private firm's policy forbidding employees from accepting gratuities where employees received gratuities but falsely reported to their employer that they had not done so.

PARTIES TO THE PROCEEDING

Four defendants were tried jointly in this case. In addition to petitioner, the defendants were John Buchanan, Edward Pfeffer and George Keckeisen. Following conviction and sentence, all four defendants appealed. Each defendant's appeal was separately docketed in the Court of Appeals (Nos. 82-1165, 82-1169, 82-1170, 82-1398). A single panel of that court decided all four cases on the same day.

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Petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (App. A., *infra,* A1-A2) is not yet reported. The memorandum and order of the district court (App. B, *infra,* A3-A26), are also not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1982 (App. A, *infra*, A1). A timely petition for rehearing in banc was denied by an order entered on October 13, 1982 (App. C, *infra*, A27). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTE INVOLVED

18 U. S. C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

This is a federal criminal case involving conviction of mail fraud in violation of 18 U. S. C. 1341 and a related conspiracy.[1] Affirmance of the conviction by the Court of Appeals results in extension of this federal crime to circumstances not previously included. It is this expansion of the scope of a malleable federal criminal statute that provides the basis for this petition for certiorari.

American Airlines moved freight from one airport terminal to another by means of truck transport. This type of shipment, known in the trade as "HUB trucking," was done by various trucking companies under contracts with American Airlines. Pinto Trucking Service, Inc. (hereinafter "PTS") was one of the firms that provided this service for American. Petitioner, Biagio Pinto, owned and operated PTS. He was tried and convicted for mail fraud on the basis of gratuities that he paid to three American Airlines' employees who held various jobs in American Airlines' freight division. The three employees, Buchanan, Keckeisen and Pfeffer, were also charged and convicted of mail fraud. The conviction rests upon a determination that these employees falsely reported to their employer that they had not received any gratuities.

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1. Petitioner was also convicted of a single count of conspiracy, but the basis for this count is the same as the twelve substantive counts of mail fraud. The same flaw that vitates the mail fraud counts undermines this conviction for a related conspiracy.

The indictment charged petitioner and his codefendants with violations of the Elkins Act, 49 U. S. C. 41(1). The district court found that the facts proved did not make out a case under these charges and acquitted the defendants. (42a).

Citations to pages with the suffix "a" refer to the appendix filed in the court below for the several appeals of petitioner and his codefendants.

The case was tried in the district court without a jury. The trial judge, as required by Federal Rule of Criminal Procedure 23(c), filed findings of fact. Those findings now provide the principal basis for the decisions by the trial court in the first instance, and by the Court of Appeals on appeal.[2]

The district court received and explicitly relied upon a stipulation of agreed facts submitted jointly by the prosecution and defense to the trial court. This stipulation, made of course with the consent of the government, is also pertinent to the decisions of the courts below.

The key finding of the district court was that the payment of gratuities by petitioner to the three American Airlines' employees did not result in any economic injury to American Airlines. In Finding of Fact No. 29, the district court noted that American Airlines, after learning of the nature and extent of the gratuities paid, still had no complaint about the quality of the services provided by PTS or of the prices that PTS charged for those services.

> From at least 1966 until sometime in 1981, American Airlines was satisfied with the quality of service pro-

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2. In addition, in the Court of Appeals, the Brief for the United States ignored the district court's findings of fact. The government presented its argument by elaborate citation to those parts of the evidentiary record which it believed would support a general verdict of guilty. The Court of Appeals did not hear oral argument and announced its decision in a brief judgment order that contains no analysis by that court. Thus, it cannot be known whether the Court of Appeals was led to err by the failure of the government to limit its argument to the district court's findings. It is highly inappropriate, after a nonjury trial, to ignore the considered conclusions of the district judge, who may or may not have accepted as true evidence that the prosecution adduced in its effort to win conviction. In this petition, as in the appeal by petitioner in the court below, the factual basis for the case is represented by the district court's findings.

> vided and the tariff rates filed by PTS. In fact, American Airlines continued to utilize the carriage service of PTS for approximately three years subsequent to the termination from employment of the defendants Keckeisen, Pfeffer and Buchanan (35a).

This critcial finding of fact was buttressed by the stipulation that a formal senior management official of American Airlines had declared, with full knowledge of the activities of these employees and their receipt of gratuities, that he could not understand what these employees might have done for PTS in return for the gratuities (101a).

In the courts below, the government sought to establish that the three employees had defrauded American Airlines by wrongfully awarding contracts to PTS. Its efforts to make such a case were based upon gross exaggeration of the power that these three employees had to control the selection or retention of carriers to serve American Airlines. The findings of fact establish clearly that these employees lacked such power. Such decisions were made in the corporate headquarters of American Airlines, by senior officers of the corporation. None of petitioner's codefendants ever held such senior posts. A former senior officer of American Airlines, fully knowledgeable of the manner in which contract decisions were made, thus declared that he could not understand what these employees could have done for PTS in return for the gratuities. Further, American Airlines continued to use the services of PTS for three years after the employment of the three employees had been terminated.

The government built its case around the theory that the Manager of Freight Sales and Services at various airports had authority to control trucking contracts. Defendants Buchanan, Keckeisen and Pfeffer each served for a time in this post at the Philadelphia airport. Pfeffer and

Keckeisen held similar posts at other airports for part of the time after leaving Philadelphia. In Finding of Fact No. 9, the district court found that the contracting relationship between PTS and American Airlines "significantly correspond(ed) to the promotions and transfers of the American Airlines' defendants" (25a).

This finding of fact is clearly erroneous. The only trucking contract won by PTS when one of the defendants was manager of an airport freight facility was service between Chicago and Indianapolis (30a). Pfeffer, then manager of the American Airlines' freight service in Chicago, recommended PTS to his corporate superiors, but the same recommendation was also made by the manager at Indianapolis, with whom PTS had had no prior contact (809a-810a). The decision to award the Chicago to Indianapolis contract to PTS was not made by either airport manager, however; that decision was made by a senior vice president in the corporate headquarters in New York.

Conclusive proof that the freight managers at airports lacked power to control contract awards is shown in the findings that PTS failed to win contracts even though one of the defendants, as freight manager of an airport facility, had recommended PTS. PTS failed to win a contract for the New York-Syracuse run even though Keckeisen, freight manager in New York, recommended PTS (34a-35a). PTS failed to obtain a contract for service between Boston, New York and Philadelphia even though freight managers at two of these airports recommended PTS (31a-32a).

The facts as found by the district court, therefore, do not show any significant correspondence between the awarding of American Airlines' business to PTS and the service of petitioner's codefendants in their roles as freight

managers of airport facilities for American Airlines.[3] Only one contract was ever awarded in these circumstances. Moreover, the record clearly shows that the payment of gratuities to the three employees did not coincide with their assignment to the airport freight managerial positions.

The court found, for example, that defendant Buchanan had received gratuities from petitioner for twelve years, from 1966 to 1978 (26a-27a). Prior to 1976, when he became freight manager of the Philadelphia facility, Buchanan had held subordinate positions in American Airlines' freight section at the Philadelphia airport. The government made no effort to prove and the district court made no finding that an employee in the subordinate positions held by Buchanan for ten of those twelve years could even make a recommendation or otherwise influence the selection or retention of a trucking company. The record does not support any conclusion that petitioner paid gratuities to three American Airlines' employees in connection with their service as freight managers in airport facilities.

Notwithstanding the demonstrated lack of power of petitioner's three codefendants to control the award of trucking contracts by American Airlines, and despite the almost total failure of their recommendations to influence

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3. The conclusion that the employees did not award or influence the award of contracts to PTS is underscored by the determination in the trial court that there was no violation of the Elkins Act, 49 U. S. C. 41(1). In *United States v. Braverman*, 373 U. S. 405 (1963), this Court held that a violation of the Elkins Act is shown if a carrier makes payments to an employee of a shipper in order to obtain shipping business. The acquittal of defendants in this case of any violation of the Elkins Act negates any finding that the gratuities paid here were related to the awarding of trucking contracts to PTS.

the contracting decisions of the officers of American Airlines, the district court found that petitioner's payment of gratuities to these three employees afforded PTS a "preferred and exceptional status with respect to eventual award of American Airlines' 'HUB' trucking routes and the provision of certain services" (24a-25a).[4]

In sum, this mail fraud conviction rests upon findings that three American Airlines employees, who had received gratuities from petitioner, recommended on occasion that their employer contract with PTS, and that these employees concealed their receipt of gratuities by filing false statements with their employer.

The district court (Hannum, D.J.) sentenced petitioner to imprisonment for five years on the conspiracy count and to two years of prison for each of the twelve substantive mail fraud counts. The two year sentences were ordered to be served concurrently, but consecutive to the five year term. The trial judge also sentenced petitioner to a fine of $10,000.

The Court of Appeals for the Third Circuit (Gibbons, Weis and Sloviter, C.JJ.) affirmed.

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4. In another finding of fact, No. 18, the district court elaborated by stating that "American Airlines was deprived of the opportunity to search for or gain access to a carrier providing a higher quality of service at a lower price" (29a) (footnotes omitted).

REASONS FOR GRANTING THE PETITION

By Interpreting 18 U. S. C. 1341 to Reach the Facts of This Case, the Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Ought to Be Settled by This Court.

The statutory definition of the crime of mail fraud is extraordinarily malleable and, therefore, a special responsibility lodges in the federal courts to control application of the statute to matters of legitimate federal concern. The convictions of petitioner and his codefendants are an unprecedented and unwarranted expansion of the scope of this federal offense. Never before has the crime of mail fraud been invoked when the underlying "fraud" is violation by an employee in a private firm of his employer's conflict of interest policy on receipt of gratuities.

The pertinent language of the mail fraud statute, 18 U. S. C. 1341, defines the offense in these terms: "scheme or artifice to defraud, or for obtaining money or property by means of false and fraudulent pretenses, representations, or promises." As the Court of Appeals said in a recent case, the provisions of this act are "seemingly limitless." *United States v. Von Barta*, 635 F. 2d 999, 1001 (2d Cir. 1980). It is an imperative judicial function to construe such statutes to prevent the unnecessary involvement of federal courts into matters that can be left to the states for resolution.

Containment of seemingly limitly federal criminal statutes is an especially vital concern when the federal courts are massively overburdened with a caseload that, in the views of some justices and judges, threatens the capacity of those courts to function. Any extension of a major federal criminal statute into new fields is an important question that ought to be considered by this Court.

Only last Term, this Court acted to constrain expansion of federal criminal provision dealing with fraudulent conduct, but a far less pervasive provision than the mail fraud statute. The statute involved makes it a crime to make a false statement in connection with an advance from a federally insured financial institution. 18 U. S. C. 1014. Federal prosecutors sought to apply this act to check kiting schemes. This Court held that the government's interpretation of the statute would make a surprisingly broad range of unremarkable conduct a violation of federal law. The conviction was set aside. *Williams v. United States*, — U. S. —, 102 S. Ct. —, 73 L. Ed. 2d 767 (1982).

The government's theory in the present case would make a surprisingly broad range of unremarkable conduct a violation of the federal mail fraud statute. It is the government's theory that three employees of American Airlines devised a scheme or artifice to defraud their employer when they accepted gratuities from petitioner and falsely reported to American Airlines that they had not done so. There were no sustainable findings in the trial court that these employees intended to injure their employer in any way. The actions of American Airlines after learning of the employees' actions demonstrate that it suffered no injury, and the trial court explicitly found that American Airlines was fully satisfied with the quality and price of petitioner's firm's services. False statements about gratuities on conflict of interest reports, with no showing of intent to injure or actual injury to the employer, should not be comprehended within the federal mail fraud statute.

In the courts below, the government conceded that there is no precedent for the application of the federal statute to circumstances like those presented in this case.

Indeed, examination of the caselaw reveals that, until now, lower federal courts have consistently resisted use of the mail fraud in employer-employee disputes of this kind. This Court has not yet accepted the opportunity to review any of the decisions involving application of the mail fraud statute to employer-employee transactions. There now exists a clear pattern of cases which provide adequate background to guide this Court in establishing appropriate principles to interpret section 1341.

In the case that most closely resembles the present case, the Eighth Circuit held that there was no federal crime. *United States v. Rabbitt*, 583 F. 2d 1014 (8th Cir. 1978), *cert. denied*, 439 U. S. 1116 (1979). The defendant had been a member of the Missouri House of Representatives and eventually became the Speaker of the House. While a member of the House, Rabbitt offered to use his influence to help a firm of architects to get contracts for architectural services on public buildings; in exchange, Rabbitt required a fee of 10 percent from any resulting contracts. Rabbitt carried out his part of the scheme, and the firm received contracts. Payments of Rabbitt's fee were concealed by paying them through a law firm. There was no evidence of financial loss to the state. The government contended that Rabbitt's conduct was fraudulent because it deprived the citizens of Missouri of their right to his honest and faithful service. The Eighth Circuit rejected this contention:

> Whether a showing of dishonesty on the part of a state official, outside his official duties, with no financial loss to the state constitutes a fraud upon the public and thereby statutory mail fraud is, in our judgment, highly questionable. Every case of breach of public trust and misfeasance in office in connection with which some mailing has occurred

> does not and cannot fall within the confines of the mail fraud statute. In the instant case, we hold that the evidence does not establish mail fraud within the federal statute. . . .

The Eighth Circuit decision in *Rabbitt* is in accord with its earlier decision in *United States v. McNeive*, 536 F. 2d 1245 (8th Cir. 1976).

The Second Circuit has also rejected the broad argument that would bring employer-employee disputes within the scope of federal mail fraud:

> In the instant case, we are asked to construe two seemingly limitless provisions, the mail and wire fraud statutes, in the context of the employer-employee relationship. The government urges us to hold that these statutes are violated whenever an employee, acting to further a scheme for pecuniary gain, intentionally breaches a fiduciary duty of honesty and loyalty he owes his employer. . . . (W)e reject the sweeping theory advanced by the government. . . . *United States v. Von Barta, supra*, 1001-1002 (footnotes omitted).

In the present case, as in *Von Barta*, there were violations of the corporate policy of the employer. The three American Airlines employees denied receiving gratuities in violation of a company rule. That did not prevent them from carrying out their official duties to their employer. American Airlines has made no complaint of any actions that these employees took in the performance of their responsibilities. As in *Rabbitt*, these employees did not have the authority to enter into contracts. Petitioner was selected by a senior vice president of American Air-

lines, and the court below found that American was fully satisfied with the price and quality of the trucking services provided by petitioner's firm. That view did not change even after American Airlines become aware of the gratuities their employees had accepted from petitioner.

The government's attempt to make out a violation of the federal mail fraud statute in this case has consisted of a series of vague generalizations extracted from the reported decisions and presented, devoid of any factual content, as support for its sweeping conclusions. When the cases are examined in factual context, however, it is plain that there is no support for the government's argument. All mail fraud cases in which convictions of employees have been upheld fall into four categories:

(1) Employees' stealing and exploiting assets that belong to their employers;

(2) Employees' deceiving their employers into entering into contracts with entities secretly owned by those employees;

(3) Purchasing agents' abusing their authority to contract for their principals by demanding kickbacks from firms wishing to do business with those principals;

(4) Elected high level public officials' violations of public trust.

The prosecution in the present case does not fit into any of these four categories. There is no charge here that the employees stole an asset belonging to their employer. The employees did not induce American Airlines to let contracts to a firm that they secretly owned. These employees were not purchasing agents. Although

the government has sought and continues to seek to exaggerate their roles in the system of recommendations that filtered up to corporate headquarters on contract matters, even the government does not argue that they had the power of purchasing agents. And, of course, these employees may have violated a corporate policy on gratuities, but they certainly were not involved in high level political corruption.

The category of cases into which this case fits is that described by the Second and Eighth Circuits as falling outside the reach of federal criminal prosecution. This is driven home by the lame attempt of the government to distinguish *United States v. Rabbitt, supra.* Thus, the government argues that Rabbitt's employer was not the state or the citizens of the state, as the Eighth Circuit had found, but was only the state legislature. From this muddled premise, the government argues that the state agencies contracting for architectural services had been victimized, not Rabbitt's employer, the House of Representatives. Legislators are elected by the citizens and are officers of the state. The government's spurious distinction of *Rabbitt* underscores the unprecedented nature of this conviction.[5]

Neither the American Airlines employees nor petitioner in this case should be convicted of federal mail fraud on the basis of gratuities that the employees re-

5. This argument appears in the United States Brief, filed in the court below as appellee in the appeals of the three American Airlines employees, at pp. 42-43. The government also states that the Eighth Circuit upheld one mail fraud conviction in the *Rabbitt* case, but the government does not point out that the only question raised as to that conviction was whether the use of the mails had been sufficiently connected to the fraudulent scheme to permit conviction of mail fraud. The facts involved were entirely different from the facts in the 10 counts that were reversed.

ceived from petitioner and concealed from their employer. There is not even a civil suit by American Airlines against the employees. No officer or executive of American Airlines found anything to criticize in their work. For violating the company conflict of interest rules, they forfeited their jobs. That is an inadequate basis for bringing the weight of federal criminal law to bear. Petitioner's circumstances are more compelling for reversal. American Airlines has made no complaint about the trucking services provided by petitioner's firm. It continued using that service for three years after discovery that the employees had accepted gratuities from petitioner. This clearly indicates that American Airlines treated its own conflict of interest rules as an internal matter, having nothing to do with petitioner or his firm.

In light of the pattern of decisions that has evolved in the lower federal courts, it is timely and appropriate for this Court to provide definitive guidance on the scope of section 1341 in circumstances involving employment relations. Unless this Court intervenes promptly, the expansionist interpretation by the courts below in this case will lead government prosecutors and other courts to increase the number of mail fraud prosecutions arising from employee violations of terms and conditions of their employment. The scope of the expansion would be extraordinary. False expense account vouchers or false statements of hours worked would become grist for federal criminal prosecution whenever some nexus with a mailing is found. Petitioner will contend that such expansion of the mail fraud statute's effective range is improper. The immediate question, for purposes of this petition for certiorari, is not just the merits of the matter but whether it is timely for this Court to consider the issue and render a definitive decision.

CONCLUSION

The pressures on this Court have been growing rapidly. Every expansion of the scope of a federal statute inevitably impacts on the workload of this Court. With all of the demands on this Court's time, a high priority should be given to the shaping and limiting of the scope of federal criminal statutes. That is particularly true with a statute as "seemingly limitless" as the mail fraud statute. This petition for certiorari should be granted.

Respectfully submitted,

CARMEN C. NASUTI
Counsel for Petitioner

November, 1982